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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 401.

UNITED STATES OF AMERICA for the Use of H. W. MOSELEY, d b a MOSELEY PLUMBING AND HEATING COMPANY,
Petitioner,

vs.

ELECTRONIC & MISSILE FACILITIES, INC., et al.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF PETITIONER.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit with the dissenting opinion of Judge Rives is reported at 306 F. 2d 554 and appears in the record at pages 125-136.

The opinion of the District Court is contained in the record, pages 120-124.

JURISDICTION.

The jurisdiction of this court is invoked under 28 U. S. C. 1254 (1). Certiorari was granted December 3, 1962.

STATUTES INVOLVED.

The questions presented involve Secs. 1, 2 and 3 of the United States Arbitration Act and Sec. 2 of the Miller Act.

The Sections of the United States Arbitration Act here involved are set out in 9 U. S. C. 1, 2 and 3. Because of their length they are set out in full in the Appendix to this petition.

Sec. 2 of the Miller Act is set out in Act August 24, 1935, c. 642, Sec. 2, 49 Stat. 794, as amended by Act August 4, 1959, pub. L. 86-135, Sec. 1, 73 Stat. 279, and is now set out in 40 U. S. C. 270b as follows:

> "(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: Provided However, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such persons did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the

name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

"(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit."

QUESTIONS PRESENTED

(1) The primary question presented by this petition is whether, in a suit under the Miller Act (40 U. S. C. 270 b) against a prime contractor and its surety by an unpaid subcontractor, the prime contractor and surety are entitled to a stay of such Miller Act suit to have the claim of the subcontractor determined by arbitration under provisions of the subcontract, or whether, on the other hand, such unpaid subcontractor is entitled to prosecute said action to final execution and judgment.

Respondent, Electronic & Missile Facilities, Inc. (formerly Five Boro Construction Corporation) was the prime contractor and respondent Continental Casualty Company was its surety in contracts with the United States of

America for the construction of Nike-Hercules facilities, one contract being for construction of such facilities at Robins Air Force Base Defense Area, Georgia and the other for facilities at Turner Air Force Base Defense Area, Georgia, both of which Air Bases are located within the Middle District of Georgia. The use petitioner, H. W. Moseley, d/b/a Moseley Plumbing and Heating Company, entered into written subcontracts with the prime contractor under which Moseley was to do the plumbing and heating work in the construction of each of said facilities. After the work had been completed Moseley filed this suit in the District Court for the Middle District of Georgia under the Miller Act seeking to recover various sums to which he contended he was entitled and which were unpaid. The suit sought an injunction against the prime contractor's proceeding with an arbitration proceeding which had been commenced by it against Moseley in the City of New York under the purported authority of provisions of the subcontract. That defendant was temporarily restrained from proceeding with the purported arbitration. The defendants filed a motion to dismiss, or in lieu thereof to stay, the suit until an arbitration should be had in accordance with the provisions of the contracts. The District Court after a hearing determined the question adversely to the defendants, respondents herein, holding that the provisions of the United States Arbitration Act cannot be invoked in a Miller Act case so as to stay the proceedings in such case and compel unwilling arbitration, and accordingly denied the alternative motions to dismiss and to stay the proceedings and continued the temporary restraining order in force. On appeal the United States Court of Appeals for the Fifth Circuit, in a two to one decision, reversed the judgment of the District Court and held, with one Judge dissenting, that the provisions of the contract with reference to arbitration were valid and enforceable and the defendants were entitled to a stay of the Miller Act suit until arbitration had

been had. This Court granted certiorari on December 3, 1962.

The question thus presented is whether, as held by the majority of the Court of Appeals for the Fifth Circuit, an unpaid subcontractor, in spite of the explicit provision of the Miller Act that he "shall have the right to sue . . . and to prosecute said action to final execution and judgment for the sum or sums justly due him," must nevertheless have his suit stayed and submit his claim instead to arbitrators for determination where he has signed a subcontract purporting to so provide, or whether, on the other hand, as held by the District Court and the dissenting opinion of the Court of Appeals, the provisions of the United States Arbitration Act for compelling arbitration, are inapplicable to suits under the Miller Act adopted ten years after the Arbitration Act, for the reason that the explicit provision that persons occupying the position of an unpaid subcontractor "shall have the right to sue . . . and to prosecute said action to final execution and judgment" render unenforceable a provision inserted in a subcontract by a prime contractor or purporting to take away those rights so explicitly stated by Congress.

(2) The second question presented is whether the subcontracts between Moseley and the prime contractor for the plumbing and heating work at these Nike-Hercules facilities were contracts "evidencing a transaction involving commerce" within the meaning of the United States Arbitration Act. This question would be reached only in the event the primary question above stated should be decided adversely to petitioner's contention. The District Judge found it unnecessary to determine this question, stating "assuming but not deciding that the subcontract here sued upon comes within the ambit of Sec. 2 of the Arbitration Act" (R. 121), while the Court of Appeals for the Fifth Circuit held the Arbitration Act was applicable to these contracts (R. 126-127).

STATEMENT OF CASE.

The facts as to the primary question are not in dispute because this question was decided by the District Court and the Court of Appeals for the Fifth Circuit and will be decided by this Court upon the basis of the facts alleged in the complaint and the law applicable thereto.

Suit was brought by petitioner under the provisions of the Miller Act to recover sums due and unpaid to him as a subcontractor who had furnished labor and material in the prosecution of the work provided for in the contract between the defendant contractor and the United States of America. The complaint was brought in six counts. Counts I and II seek recovery directly on the contracts, count I relating to the contract for the work at Robins Air Force Base Defense Area near Warner Robins, Georgia, and count II relating to the contract for work at Turner Air Force Base Defense Area, near Albany, Georgia. The complaint attached copies of the subcontracts, which were on printed forms with blanks filled in by typewriter as to the name and address of the subcontractor, identification of the prime contract, the contract amount and the description of the work covered by the subcontract. The printed subcontract forms covered 13 pages, and thus were in fine print as compared to their appearance in the record, where the subcontract covering the work at Robins Air Force Base Defense Area covers 34 pages, being set out at pages 17-50. It is stipulated (R. 50-51) that the subcontract for the work at Turner Air Force Base Defense Area is identical except for the location of the work and the amount of the contract price. Count I alleged the defendant was indebted to the plaintiff in the sum of $71,900.57 on the Warner Robins Air Force Base Defense Area contract, and count II alleged an indebtedness of $44,970.10 on the Turner Air Force Defense Area contract. It was alleged that paragraph 26 of

the subcontract purports to provide that any controversy or claim arising out of said contract shall be determined by arbitration, but it was alleged that said provision for arbitration is void and unenforceable because (a) it is contrary to public policy in that it is in direct violation of the express provisions of the Miller Act, (b) it is an attempt to oust the Federal District Court of jurisdiction and to deprive petitioner of benefits intended by the Miller Act, . . . (e) it is unreasonable and arbitrary and its enforcement would work a hardship upon petitioner to the extent of depriving him of the rights intended to be granted by the Miller Act in that it would require presentation of evidence before a foreign forum many hundreds of miles removed from the place where the work was performed and where petitioner's witnesses would be available and petitioner would not be able to compel the presence of witnesses at such distant place, as more fully set out in the record, pages 4-5. It was alleged that in spite of the invalidity of said arbitration provision the defendant contractor had filed in the Supreme Court of the State of New York, County of New York, a purported arbitration proceeding, had procured an order setting a hearing for February 28, 1961, and had purported to serve the same upon petitioner by mail, and unless temporarily restrained and enjoined said defendant would proceed with said purported arbitration to the irreparable injury and damage of petitioner (R. 5).

It was further alleged (R. 5) that petitioner could not adequately present the facts relating to his claim against defendants in said arbitration proceedings because compulsory process to require the presence of witnesses from the Middle District of Georgia in the Supreme Court of the State of New York, more than 700 miles from the Middle District of Georgia would not be available.

It was further alleged (R. 5) that the Miller Act requires that a suit be commenced within one year after the

last labor was performed or material was supplied and all of petitioner's rights under said Act would be lost if he participated in arbitration proceedings and the same were not concluded within one year from the date when the last work was performed or material supplied by petitioner. Each of these counts prayed that the defendant contractor be temporarily and permanently enjoined from proceeding with the purported arbitration in New York.

Count III, with respect to the Warner Robins Air Force Base Defense Area contract, and Count IV, with respect to the Turner Air Force Base Defense Area contract, seek to rescind the contracts because of fraud on the part of the defendant prime contractor and to recover in quantum meruit $95,678.79 and $96,335.88, respectively, as well as $20,000.00 on each count as attorneys' fees and other expenses of litigation to which petitioner claims to be entitled because of the bad faith, misconduct, fraud, malice and oppression on the part of the defendant prime contractor alleged in those counts. These counts adopted all of the pertinent allegations of the previous counts with respect to the pendency of the purported arbitration proceedings in New York, the contentions of petitioner as to the invalidity of the provisions of the contract relating to arbitration, the inability of petitioner to adequately present the facts relating to his claim in such arbitration proceedings, and the necessity for said proceedings to be enjoined, and likewise prayed for a temporary and permanent injunction against the defendant contractor's proceeding with such arbitration.

The fraud which petitioner claimed entitled him to rescind the contract was that the defendant prime contractor "has been guilty of the grossest kind of misconduct, fraud, malice and oppression in its entire dealings with Moseley Plumbing and Heating Company in connection with said work and said contract in that it conceived and executed

a fraudulent and illegal scheme, plan and design to perpetrate a fraud upon Moseley Plumbing and Heating Company, and other subcontractors as well, by causing said Moseley, as well as other subcontractors, to furnish materials and labor for said project with the intention on the part of said defendant of obtaining a large portion of said work and materials without paying therefor or by browbeating Moseley and said other subcontractors into accepting much less than their real value, which said plan, scheme and design was conceived, executed and perpetuated upon Moseley in the following particulars: . . ." (R. 9).

Then follow the particulars as to how said fraudulent scheme was carried into effect, set out in the various subparagraphs (R. 9-12) which may be summarized as follows:

(a) The defendant represented it was a general contractor and that the work to be done by Moseley was that spelled out in the typewritten part of the printed subcontract, whereas in truth that defendant had no intention of performing the proper function of a general contractor by doing substantial parts of the work itself and supervising and coordinating the work of subcontractors but instead intended to and did subcontract substantially all of the work and itself had no employees except for a project superintendent and a handful of laborers.

(b) Pursuant to that plan of operation said defendant fraudulently and with malice inserted into its printed subcontract form provisions purporting to authorize it to require Moseley or other subcontractors to do any work whatever, regardless of whether it bore any proper relation to the work called for in the main typewritten portion of the subcontract, which provisions were inserted with the specific malicious intent of using them to give color to and to act as a specious cover for directives to do work

in no way connected with the plumbing and heating called for by Moseley's subcontract and with the intention of avoiding payment under the false and fraudulent contention that the work was covered by such subcontract, and if it could not get Moseley to accept the work as part of the subcontract to get him to accept a greatly reduced amount of compensation in order to avoid litigation and to obtain money with which to pay his creditors.

(c) Said defendant did issue numerous directives to Moseley to do work which the defendant knew was not covered by the contract but defendant in bad faith and maliciously as a part of said scheme contended it was so covered, and defendant's bad faith in this connection was so great that it discharged from its employ its project superintendent who attempted to be honest and agreed with Moseley and other subcontractors that work called for by such directives was not covered by the subcontract and that he should receive additional compensation therefor.

(d) As a part of said scheme the defendant issued a large number of such directives so as to greatly increase the amount of work to be done by Moseley and increase his capital outlay and, at the same time, withheld payments to which Moseley was entitled, with the express purpose and intent of producing financial pressure upon Moseley with the intention of forcing him to settle with them for a price far below the real value of such additional work.

(e) This scheme of producing financial pressure on Moseley was a general scheme which said defendant applied to all subcontractors in order to squeeze profits for itself from the financial sacrifices it was attempting to cause said subcontractors to make, which plan was carried to complete fruition both with respect to Moseley and every other subcontractor, practically all, if not all of

the subcontractors becoming insolvent by the time the project was completed.

(f) As a further part of said scheme said defendant carried out a practice of making back charges against each of the subcontractors and Moseley by which it billed them for enormous and outrageous charges for work allegedly covered by the subcontract and allegedly done by said defendant, when the defendant in truth knew that the work for which the back charges were made was not a part of the subcontract and the charges were maliciously made in an effort to reduce the compensation to which Moseley was entitled, and, for various work not covered by any subcontract but plainly required to be done by said prime contractor, that defendant allegedly prorated the cost between each of the subcontractors but in fact actually charged the total cost of such work to each of such subcontractors, and in addition the defendant attempted to charge Moseley the cost of work performed by other subcontractors clearly covered by their subcontracts and not covered by Moseley's subcontract.

(g) The provisions of the subcontract purporting to require arbitration of any claim or dispute in New York were maliciously inserted in furtherance of the express purpose of the defendant to obtain work and material without paying therefor and with the intention on the part of the defendant of causing a purported arbitration in New York, at least 700 miles from the Middle District of Georgia, where it knew and intended that Moseley and other subcontractors could not properly appear and present their evidence and claims because of the impossibility of compelling the attendance of witnesses at such great distance and because of being financially unable to do so because of the financial stress intentionally produced by the defendant, all with the intention of having allowed in favor of the defendant in such arbitration proceeding all of the false and fraudulent claims of defendant that Mose-

ley was not entitled to compensation for extra work done under directives from that defendant and of having allowed their false and fraudulent back charges and with the intention of defeating the right of Moseley and other subcontractors to have their legitimate claims litigated in the United States Court for the Middle District of Georgia as expressly provided by the terms of the Miller Act.

Counts V and VI sought recovery for work done under the contracts at Robins Air Force Base Defense Area and Turner Air Force Base Defense Area, respectively, under the alternative theory that, even if petitioner could not show full performance of all terms of the subcontract so as to be entitled to recovery on the contracts themselves under Counts I and II, and even if petitioner should be unable to establish a right to rescind the contracts as sought in Counts III and IV, petitioner was nevertheless entitled to recovery of the reasonable value of the labor and materials furnished by petitioner and retained by the defendant, less payments made by defendant and any legitimate damages which may have been suffered by the defendant. These counts adopted all of the same allegations as to the purported arbitration proceedings, the invalidity of the contract provisions with respect to arbitration, the inability of Moseley to properly present his claims in the arbitration proceedings, and the necessity of enjoining such proceedings.

Upon filing and presentation of the verified complaint a temporary restraining order was entered restraining the defendant prime contractor from further proceedings in connection with his application for arbitration in New York, and thereafter the restraining order was continued in effect by consent of all parties.

The defendant prime contractor filed its motion to dismiss, or in lieu thereof, to stay the proceedings until an

arbitration should be had in New York in accordance with the terms of the subcontract. Upon the hearing of this motion there was introduced an affidavit of Nathan Cohen, Executive Vice President of the defendant prime contractor, to the effect that the Nike installations at the Warner Robins Air Force Base Defense Area and the Turner Air Force Base Defense Area are four of approximately seven hundred different bases for anti-aircraft defense tied together by a system (SAGE) with headquarters in Colorado, consisting of bases stretching across Canada, Texas towers at sea, radar stations and communication centers along both seaboards of the United States and BOMARC and Nike stations scattered throughout the United States, that the Nike stations erected at Robins Air Force Base Defense Area and Turner Air Force Base Defense Area are designed not only to protect the Strategic Air Command bomber bases at those locations but to intercept enemy planes coming from abroad heading towards other installations in the United States, and that they are an integral part of an intercontinental defense system and were constructed to enlarge the existing facilities for such systems.

There was introduced also the deposition of Major John W. Poston, a witness for the petitioner, who was operations officer of an artillery missile battalion charged with the operation of the facilities constructed at the Robins Air Force Base Defense Area. His testimony showed that the areas where these facilities were constructed were previously open land and forest with no improvements whatever, located about 15 to 17 miles from Warner Robins Air Force Base and Turner Air Force Base, respectively, that there were at these locations after completion of construction no facilities for operation of aircraft, but the primary purpose and functions of the installations was to launch missiles that would intercept enemy planes to defend the country in the event of hostile attack.

It was clear from Major Poston's testimony that even after full completion of the construction contract by the prime contractor the facilities had not, and could not, become a part of the defense system detailed in his testimony and in the affidavit of Cohen, but that it was necessary for the Army then to install a tremendous amount of equipment; such as cabling systems, computers, launchers, radar controls, antennas, and assembling equipment, and it had to bring in missile components and build them into missiles and place them on the launchers which the Army had installed, develop security systems, set up systems for housing, feeding and administering troops, move in troops and then tie the facilities in by communications to other parts of the defense system (R. 76-78). He testified (R. 97-98) that after full completion of the contract by the prime contractor, it was necessary for the Army to do $200,000.00 worth of labor and install $7,000,000.00 worth of equipment at each of two different locations at Warner Robins Air Force Base Defense Area and two locations at Turner Air Force Base Defense Area. Thus the total labor left to be done by the Army was some $800,000.00 worth, and the total cost of equipment which had to be installed was approximately $28,000,000.00, all of which was necessary in order for the facilities, after completion of the prime contractor's construction, to become a part of the defense system.

The only evidence related to the nature of the construction. The primary question as to the enforceability of the arbitration provisions of the contract, and the right of the defendant prime contractor to a stay of the Miller Act suit was determined as a question of law on the basis of the allegations in the complaint.

It is significant that the provisions of the subcontract with respect to arbitration do not require that there be any dispute between the parties. It purports to provide

even that any claim under the contract shall be submitted to arbitration. That provision is: "Arbitration: Twenty-Sixth: (a) Any controversy or claim arising out of or relating to this agreement or the breach thereof, provision for the determination of which is not made elsewhere in this agreement, shall be settled by arbitration in the Borough of Manhattan, City and State of New York in accordance with the Civil Practice Act of the State of New York. The Contractor and the Subcontractor agree that any application by either side for the appointment of an arbitrator in accordance with this paragraph shall be made in the Supreme Court of the State of New York, County of New York, and that said Court shall have jurisdiction over every party in connection with any such arbitration. The cost of such arbitration shall be borne equally" (R. 42).

Although the majority opinion of the Court of Appeals for the Fifth Circuit contains the statement (R. 129): "The appellee has not even attempted to demonstrate how or why he would be prejudiced by having this dispute settled by arbitration rather than in the federal courts"; the case was decided both in the District Court and in the Court of Appeals on the basis of the allegations of the complaint, and thus there is absolutely no dispute in the record of the allegation in paragraph 15 of count I (R. 5), which is adopted in each of the other counts, that "petitioner could not adequately present the facts relating to his claim against defendants in said arbitration proceedings because compulsory process to require the presence of witnesses from the Middle District of Georgia in the Supreme Court of the State of New York, more than 700 miles from the Middle District of Georgia would not be available". Likewise there is in the record no dispute with respect to the allegations of subparagraph (g) of paragraph 2 of count III (R. 11-12), adopted in counts IV, V and VI, that: "The provisions in said subcontract

purporting to require an arbitration of any claim or dispute in the State of New York was maliciously inserted in said contract in furtherance of the express purpose of defendant to obtain work and materials without paying therefor with the intention on the part of said defendant of causing a purported arbitration of all such claims in the State of New York at least 700 miles distant from the Middle District of Georgia where it knew and intended that Moseley and other subcontractors could not properly appear and present their evidence and claims because of the impossibility of compelling the attendance of witnesses at so great distance and because of being unable financially to do so because of the financial stress intentionally produced by defendant, all with the intention of having allowed in favor of said defendant in such proceeding all of the false and fraudulent claims of defendant that extra work done by Moseley and other subcontractors was covered by their subcontracts when in fact it was not, and of having allowed their false and fraudulent back charges against Moseley and other such subcontractors as hereinbefore alleged, all with the intention of defeating the right of Moseley and other subcontractors to have its legitimate claims litigated in this Honorable Court as expressly provided by the terms of the Miller Act."

The basis for Federal jurisdiction in the court of first instance is the provision of the Miller Act, set out in 40 U. S. C. 270b (b) that

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit. . . ."

SUMMARY OF ARGUMENT.

1. When Congress creates a private right in the public interest and provides a specific remedy for its violation the right may not be destroyed by obtaining from the intended beneficiary a waiver or release of the remedy in advance of the accrual of the right.

2. The Miller Act was specifically designed to protect those whose labor and material has contributed to the public work, and it is to be liberally construed to effectuate this Congressional policy.

3. Substitution of arbitration at a distant place for a suit in the United States Court for the district in which the work was performed substantially destroys the right granted by Congress.

4. The specific purpose and intent of Congress unequivocally expressed in the Miller Act would be thwarted by staying a suit by an unpaid subcontractor to force unwilling arbitration.

5. The United States Arbitration Act is not applicable.

ARGUMENT.

1. When Congress creates a private right in the public interest and provides a specific remedy for its violation the right may not be destroyed by obtaining from the intended beneficiary a waiver or release of the remedy in advance of the accrual of the right.

In **Brooklyn Savings Bank v. O'Neil, 324 U. S. 697, 65 S. Ct. 895, 89 L. Ed. 1296,** this Court held void an agreement by an employee to release his employer from liability for liquidated damages for failure to pay the minimum wages provided by the Fair Labor Standards Act. It is important to bear in mind that in that case the right had already accrued and the employee had been paid overtime compensation which had accrued and at the time of the payment thereof had signed a release of all other rights under the Act. Thereafter he brought suit to recover the liquidated damages due him under the Act.

This Court, in holding that the release was void, said, p. 704 of 324 U. S.:

> "'It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. . . . Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will be not allowed where it would thwart the legislative policy which it was designed to effectuate.'"

It was argued in that case that Congress did not intend for such waiver of rights to be void because it had in other acts specifically provided that waiver of rights there

granted would be void, but had not so provided in this act. In rejecting that contention, this Court said (p. 713):

> "Absence of such provisions, however, has not prevented the courts from invalidating waivers where the legislative policy would be thwarted by permitting such contracts. The decision in the instant case is based on the legislative policy behind this enactment . . ."

In **Boyd v. Grand Trunk Western Railroad Co., 338 U. S. 263, 70 S. Ct. 26, 94 L. Ed. 55,** this Court held void an agreement by an injured railroad employee that any suit he brought would be brought in the state where he lived and was injured. This Court said, 339 U. S. (p. 266):

> "The right to select the forum granted in Sec. 6 is a substantial right. It would thwart the express purpose of the Federal Employer's Liability Act to sanction defeat of that right by the device at bar."

Again it is important to bear in mind that the agreement of the employee in that case was executed after he had already received injuries in his employment.

Although the court found that the agreement procured from the employee by the employer was prohibited by Sec. 5 of the Act which says that any contract which would enable any common carrier to exempt itself from any liability created by the act shall be void, the real basis of the decision was the fact that the agreement restricting the wide choice of forum given by the act would thwart the express purpose of the act. It had already been decided in **Brooklyn Savings Bank v. O'Neil,** supra, that, even in the absence of any express prohibition, a waiver of rights granted by Congress in the public interest was void where the legislative policy would be thwarted by permitting such contracts.

In **Wilko v. Swan, 346 U. S. 427, 435-438, 98 L. Ed. 168, 175-177, 74 S. Ct. 182,** this court held void an agreement to arbitrate any controversy which was contained in a margin agreement for the purchase of securities.

In that case the Court of Appeals for the Second Circuit had held in **Wilko v. Swan, 201 Fed. 2d 439,** at p. 444:

> "We think that the remedy a statute provides for violation of the statutory right it created may be sought not only in any 'court of competent jurisdiction' but also in any other competent tribunal such as arbitration . . ."

This Court reversed that philosophy and held to the opposite that the remedy a statute provides for violation of the statutory right it created is part and parcel of the right itself and the remedy may not be waived and an agreement to arbitrate substituted for it. This Court pointed out that the provisions of the Securities Act of 1933 were designed to protect investors and require dealers, etc., to make full and fair disclosure of the character of securities sold and to prevent fraud in their sale, and then said, 346 U. S., p. 431:

> . . "To effectuate this policy, Sec. 12 (2) created a special right to recover for misrepresentation which differs substantially from the common law action . . ."

The Court then adopts the argument of the petitioner that "the purpose of Congress was to assure that sellers could not maneuver buyers into a position that might weaken their ability to recover under the Securities Act", and "that arbitration lacks the certainty of a suit at law under the Act to enforce his rights."

The Court says (p. 435):

> "and we think the right to select the judicial forum is the kind of 'provision' that cannot be waived under

Sec. 14 of the Securities Act. That conclusion is reached for the reasons set out above in the statement of petitioner's contentions on this review. . . .

"When the security buyer, prior to any violation of the Securities Act, waives his right to sue in courts, he gives up more than would a participant in other business transactions. The security buyer has a wider choice of courts and venue. He thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary."

In **Pope v. Atlantic Coastline Railroad Company, 345 U. S. 379, 73 S. Ct. 749, 97 L. Ed. 1094**, this Court reversed a decision of the Supreme Court of Georgia which had held that a Court of Equity in that state could restrain a resident of the state from maintaining a suit in a court of a foreign state upon a cause of action arising in Georgia under the Federal Employer's Liability Act, where the foreign suit had for its purpose or necessary effect the obtaining of an inequitable or unconscionable advantage over the defendant.

This Court in that case again applied the principle that a cause of action given to a private party in the public interest by an Act of Congress can not be fettered where the purpose of Congress would thus be thwarted. The Court held that the right of an injured employee to bring suit in one of the forums provided by the Act could not be thus restricted, saying (p. 383):

"Congress has deliberately chosen to give petitioner a transitory cause of action, and we have held before . . . that Sec. 6 displaces the traditional power of a state court to enjoin its citizens on the ground of oppressiveness . . . from suing . . . in the state courts of another state."

Other opinions in accordance with the principle established by the foregoing decisions of this Court have been rendered by the Circuit Court of Appeals.

"Where a new right is created by statute, unknown to the common law, and the mode in which it may be enforced is specifically provided, the prescribed mode measures the extent of the power, and the right can be enforced in no other manner."

United States v. Southern Dredging Co., 251 Fed. 400.

"We think the inclusion of this section in the Employers' Liability Act, with its creation of new obligations against the employer, makes the venue provision an inherent part of the employer's liability. An attempt to limit it by contracts is an attempt to exempt the railroad from liability, and is void. . . .

"Also we think that public policy prohibits the recognition and enforcement of such contracts limiting the rights of parties in their access to the courts. Like the rights bestowed upon employees under the Fair Labor Standards Act, 29 U. S. C. A., Section 201 et seq., the rights of the employee under the Federal Employers' Liability Act are statutory rights 'conferred on a private party, but affecting the public interest.' It was held in **Brooklyn Savings Bank v. O'Neil, 324 U. S. 697, 65 S. Ct. 895, 900, 89 L. ed. 1296,** that such rights may not be released or waived."

Akerly v. New York Central Railroad Co., C. C. A. 6, 1948, 168 F. 2d 812.

In United States v. Leahy, C. C. A. 3, 1945, 148 F. 2d 462, the parties had entered into an agreement with reference to war risk insurance on ships by which 75% of the value was paid, and it was contended that under the provisions of the payment the libellant was required to pro-

ceed in the Court of Claims for collection of the difference. The Court held (pp. 466-467):

> "Determination of insurance claims is specifically within the exclusive jurisdiction of the District Court under Section 225 of the Merchant Marine Act, 1936, as amended which provides actions are to be brought according to the provisions of The Suits in Admiralty Act . . . The parties by their contract would have no power to oust the District Court of such jurisdiction . . ."

Thus in many analogous situations wherever a new right in favor of a private party has been created by an Act of Congress in the public interest and the method of enforcing the rights therein granted has been specifically provided by Congress, this Court and the various circuit courts have firmly established the principle that the right can be enforced in the manner provided in the statute, and that any attempt to curtail or restrict those rights is void.

2. **The Miller Act was specifically designed to protect those whose labor and material has contributed to the public work and it is to be liberally construed to effectuate this Congressional policy.**

This Court, in **MacEvoy Company v. United States, 1944, 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163,** at pages 105-106 of 322 U. S., held:

> "The Heard Act, which was the predecessor of the Miller Act, required Government contractors to execute penal bonds for the benefit of 'all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract. We consistently applied a liberal construction to that statute, noting that it was remedial in nature and that it clearly evidenced the intention of Congress

to protect those whose labor or material has contributed to the prosecution of the work' . . .

"**The Miller Act**, while it repealed the Heard Act, reinstated its basic provisions and **was designed primarily to eliminate certain procedural limitations on its beneficiaries.** There was no expressed purpose in the legislative history to restrict in any way the coverage of the Heard Act; **the intent rather was to remove the procedural difficulties** found to exist under the earlier measure and thereby **make it easier for unpaid creditors to realize the benefits of the bond.**"

The Court, in a footnote, pages 105-106, says:

"Under the Heard Act, a single bond was required to protect both the Government and the suppliers of labor and materials. The Government was given the sole right to sue on the bond for six months after completion of the work and final settlement. Other claimants could sue only thereafter and had to join in a single action. **Serious inconveniences and delays resulted. The claimants, often in need of immediate funds, were compelled to settle meritorious claims for less than the full amount. The Miller Act was designed to meet these difficulties** by requiring that the prime contractor execute two bonds—a performance bond to protect the Government and a payment bond to protect the creditors. Creditors can sue on the latter bond without waiting for the Government and even without waiting for completion of the project. Each creditor may sue separately ninety days after the labor is completely performed or materials fully supplied." (Emphasis supplied.)

The majority opinion of the Court of Appeals for the Fifth Circuit permits a result diametrically opposed to the specific intent of Congress as thus declared by this Court.

It is alleged in this complaint that the defendant contractor conceived and executed a fraudulent and illegal scheme, plan and design to perpetrate a fraud upon Moseley "by causing said Moseley . . . to furnish materials and labor . . . with the intention on the part of said defendant of obtaining a large portion of said work and materials without paying therefor or by browbeating Moseley . . . into accepting much less than their real value . . . ." (R. 12), and that one of the means by which said contractor carried this plan, scheme and design into effect was by the insertion in the printed subcontract of the provisions purporting to require arbitration of any claim or dispute in New York (R. 16).

In other words, petitioner alleged that the prime contractor conceived a fraudulent scheme to accomplish precisely what this Court said in the above case that the changes which the Miller Act made in the Heard Act were intended by Congress to prevent.

In **United States v. Carter, 353 U. S. 210, 77 S. Ct. 793, 1 L. Ed. 2d 776,** this Court held (pp. 216-217):

> "The Miller Act, like the Heard Act, is highly remedial in nature. It is entitled to a liberal construction and application in order properly to effectuate **the Congressional intent to protect those whose labor and materials go into public projects** . . .
>
> "The Miller Act represents a congressional effort to protect persons supplying labor and material for the construction of federal public buildings in lieu of the protection they might receive under state statutes with respect to the construction of nonfederal buildings. **The essence of its policy is to provide a surety who, by force of the Act, must make good the obligations of a defaulting contractor to his suppliers of labor and material** . . ." (Emphasis supplied.)

In **United States v. Aetna Casualty & Surety Company, C. C. A. 2, 1962, 297 F. 2d 665**, that Court held:

> "Every subcontractor and materialman not reimbursed for work done under a contract is given an unqualified right to sue on the payment bond . . . (p. 667).
>
> "The primary aim of the Miller Act was **to secure greater protection for the subcontractor.** The major changes were designed to streamline the cumbersome Heard Act machinery and **to facilitate suit** by those supplying labor or materials to the general contractor. It would be ironic indeed to find in those amendments a provision which in today's world would scuttle a major part of the bonding scheme. For that would be the result of accepting defendant's construction: **with no forum for enforcement, the bond becomes an empty gesture, a stately farce carried out by contractors and sureties, at the public expense, and to the detriment of the very class the Miller Act was designed to protect.** We cannot accept a construction which would lead to such a result . . .
>
> ". . . **the purpose of the Miller Act was clearly to provide a forum for all unpaid subcontractors" (pp. 668-669).** (Emphasis supplied.)

The clear and strong language of this Court and of the Court of Appeals for the Second Circuit shows unmistakably that the primary purpose of the Miller Act is to protect subcontractors and others whose work and labor has gone into the public work, and that the changes which the Miller Act made in its predecessor, the Heard Act, were specifically designed by Congress to make it easier for such subcontractors and others to recover sums owed to them by defaulting general contractors, and to provide a forum in which they could sue. But the Act went much further. It not only provided the forum; it went on to

provide an absolute right to such unpaid subcontractor or materialman "to prosecute said action to final execution and judgment for the sum or sums justly due him."

3. **Substitution of arbitration at a distant place for a suit in the United States Court for the district in which the work was performed substantially destroys the right granted by Congress.**

The majority opinion of the Court of Appeals held that "the appellee will not be deprived of any substantial right if it is forced to comply with its voluntarily assumed obligation to arbitrate in New York City" (R. 128).

That holding is in direct conflict with a decision of this Court which pointed out the very substantial differences in the substantive rights of the parties which may result from proceeding by arbitration rather than in the United States District Court in the District in which the work was performed, as the statute provides.

In Bernhardt v. Polygraphic Company, 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199, this Court said (p. 203):

> "For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action . . . . The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate results. Arbitration carries no right to trial by jury that is guaranteed . . . by the Seventh Amendment . . . . Arbitrators do not have the benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial—all as discussed in **Wilko v. Swan, 346 U. S. 427, 435-438, 98 L. Ed. 168, 175-177, 74 S. Ct. 182**".

This Court had already had occasion to point out the detrimental effort upon the cause of action itself which may result from having to proceed by arbitration rather than by suit in a court in Wilko v. Swan, cited in the above quotation, where this Court held void an agreement to arbitrate any controversy which was contained in a margin agreement for the purchase of securities. In so holding this Court reversed a decision of the Court of Appeals for the Second Circuit in **Wilko v. Swan**, 201 F. 2d 439, which had held at p. 444: "We think that the remedy a statute provides for violation of the statutory right it created may be sought not only in any 'court of competent jurisdiction' but also in any other competent tribunal such as arbitration . . ."

In the Wilko case this Court pointed out that the attempted waiver of the right to sue and the substitution of arbitration was contained in an agreement executed before the cause of action under the statute arose and that the security buyer "thus surrenders one of the advantages the Act gives him and surrenders it at a time when he is less able to judge the weight of the handicap the Securities Act places upon his adversary" (p. 435).

That same observation is true in the instant case. The purported agreement that any controversy or claim shall be settled by arbitration is contained in the subcontract itself which of course was executed before any work was done. Thus it is an attempt to waive in advance the right given by the Miller Act to sue and to prosecute the action to final execution and judgment if the subcontractor is not paid by the prime contractor.

The language of this Court in the Wilko case is even more applicable to the Miller Act than to the Securities Act. Rather than surrendering one of the advantages which the Act gives him, as was said by this Court of the Security buyer in the Wilko case, a subcontractor purport-

ing to agree in advance to settle any claim by arbitration surrenders **every** right which the Miller Act gives him, and completely nullifies its intended benefits.

The detrimental effect upon the rights of petitioner which would result from the staying of this suit to enforce unwilling arbitration is well pointed out by the dissenting opinion of Judge Rives, of the Circuit Court of Appeals for the Fifth Circuit where he says:

> "The propriety of extending its protection to the plaintiffs is shown by the observation of the District Court; 'the instant case strikingly demonstrates the purpose of Congress in thus providing an exclusive venue, and, it is believed, an exclusive forum for the resolution of Miller Act disputes. The inherent inconvenience and injustice of Moseley's being forced to transport himself, his records, and his witnesses from the scene of the activities under investigation to a point so distant as New York City is from Macon, Georgia is readily apparent.'
>
> "The prime contractor is in peculiarly favorable position to impose upon those who would enter into subcontracts with him burdensome agreements as to arbitration. The number of subcontractors from which the prime contractor may choose is limited only by the scope of the industry, while would-be subcontractors must seek the nod of a single prime contractor, who is in that respect a complete monopolist (R. 133-134).
>
> ". . . The holding of the majority in the present case places it within the power of prime contractors to insist upon agreements for arbitration which might well nigh nullify the beneficent provisions of the Miller Act. That is not conducive to the efficient, economical and just performance of government contracts. So thinking, I respectfully dissent" (R. 135-136).

4. The specific purpose and intent of Congress unequivocally expressed in the Miller Act would be thwarted by staying a suit by an unpaid subcontractor to force unwilling arbitration.

It having been so clearly held by decisions of this Court that a right granted by Congress in the public interest may not be destroyed by obtaining a waiver or release of the right or the remedy in advance of the accrual of the right, that the Miller Act was specifically designed to protect those furnishing labor and material in the performance of government contracts and to furnish a forum in which they might sue to enforce the rights granted for their protection under the Act, and that substitution of arbitration for a suit in the United States Court substantially affects the cause of action, then a mere reading of the language of the Miller Act demonstrates beyond any question that enforcement of the fine print provisions of a subcontract prepared by a prime contractor purporting to take away the right of the subcontractor to sue in the United States Court would thwart the purpose of Congress.

There is no question that petitioner is one of the class for whose protection the Miller Act was passed. He is a "person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under Sec. 270 a of this title and who has not been paid in full therefor before the expiration of a period of 90 days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made."

The Act says of such person that he "shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and **to prosecute such action to final execution**

and judgment for the sum or sums justly due him" (Emphasis supplied).

No more positive words could have been chosen by Congress to evidence its purpose than an unpaid subcontractor should have a right to sue on the bond and to carry the suit on to a final conclusion, without having it stayed for arbitration or any other purpose.

The unqualified right "to prosecute said action to final execution and judgment" completely excludes the possibility of such action being stayed. To sue and to prosecute an action to final execution and judgment is the exact opposite of suing and not prosecuting, but having the suit stayed.

Black's Law Dictionary (4th ed.), p. 1385, defines "prosecute" as follows:

> "**To follow up; to carry on** an action or other judicial proceeding; to proceed against a person criminally. To 'prosecute' an action is **not merely to commence it, but includes following it to an ultimate** conclusion . . ." (Emphasis supplied).

The same authority, at page 1583, defines the verb "stay" as follows:

> "To stop, arrest or forbear."

It defines the noun "stay" as follows:

> "A stopping; the act of arresting a judicial proceeding by the order of a court."

Obviously then, if an action is stayed, it is not being prosecuted; it is not being carried on; it is not being followed to an ultimate conclusion.

When Congress provided that an unpaid subcontractor shall have the right to sue, and was not content to stop there, but added the words "and to prosecute said action to final execution and judgment," the added words, if

they do not clearly mean that such a suit shall not be stayed for arbitration or any other purpose, do not mean anything whatever. Surely it can not be held that Congress added these words for no purpose and with no meaning.

It should be borne in mind that the Arbitration Act, with its provision for a stay of certain types of suits, was enacted in 1925 and had been in effect for ten years when the Miller Act was enacted in 1935 with its specific, unqualified provision that an unpaid subcontractor "shall have the right to sue . . . and to prosecute said action to final execution and judgment."

Thus it is inevitable that Congress, in enacting the Miller Act with these positive provisions, had in mind the provisions of the United States Arbitration Act which, except for the specific provisions of the Miller Act deliberately inserted by Congress, might have permitted a stay of such suits if the contract for the work evidenced a transaction involving commerce.

If Congress had not intended to prevent a stay of such suits, it would not have added the words "and to prosecute said action to final execution and judgment," but would have stopped with the words "shall have the right to sue."

That the Arbitration Act does not apply to a subsequent Act of Congress showing an overriding public policy inconsistent with the provisions of the Arbitration Act is shown by the case of Wilko v. Swan, supra.

The precise question here presented has not been previously decided by this Court or by any other Circuit Court of Appeals. There are three other cases, two from the Fourth Circuit, and one from the Sixth Circuit, indicating or holding that arbitration is allowable in a Miller Act

suit, but the contention here urged was not presented to or considered by the Court in either of those cases. This fact was pointed out by the District Judge (R. 123-124), was recognized by counsel for respondents in their arguments before the Court of Appeals for the Fifth Circuit, and it is pointed out by the majority opinion of the Court of Appeals for the Fifth Circuit (R. 131).

The first of these cases, **Agostini Bros. Building Corporation v. United States, 4 Cir., 142 Fed. 2d 854,** without considering or deciding the question here presented, was decided upon the basis that the United States Arbitration Act was applicable to all contracts containing an agreement to arbitrate, and not just those dealt with in Section 2 of the Act, namely, maritime transactions and contracts evidencing a transaction involving commerce. This view of that court was the basis for the decision authorizing a stay for arbitration. Since that decision in 1944, this view, and the entire basis for that decision, has been rejected by this Court in a decision holding directly to the contrary. In **Bernhardt v. Polygraphic Co., 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199,** this Court specifically held that the stay authorized by Section 3 was applicable only to agreements for arbitration contained in the kinds of contracts specified in Section 2, namely, maritime transactions and contracts evidencing transactions involving commerce.

The next case, **United States v. Bregman Construction Corporation,** 6 Cir., 256 Fed. 2d 851, did not grant a stay although the Court, at page 853, cited the Agostini Bros. case, supra, as authority for a statement that in a proper situation the Arbitration Act applies in proceedings brought under the Miller Act.

The other case, United States v. Al Con Development Corporation, 4 Cir., 271 Fed. 2d 904, was decided upon the basis of concession by the defendants that the provisions of the Arbitration Act "are not applicable here and that,

if the lower court has the power to stay proceedings, pending arbitration, it must find that authority in the law of the State of Virginia" (p. 906). That court then proceeded to conclude that the agreement was enforceable under the state law because the agreement provided that the decision of the arbitrators "shall be a condition precedent to any right of legal action" (p. 906).

Thus, the instant decision is the only one in which any court has considered the effect of the public policy embodied in the Miller Act upon private agreements between a prime contractor and a subcontractor that any claim or dispute shall be settled by arbitration at a place many hundreds of miles from the place where the work was performed, in spite of the specific language of the Miller Act that any person who has furnished labor or material and has not been paid, "shall have the right to sue . . . and to prosecute said action to final execution and judgment . . ."

The only other case we have found in which any court has considered the validity and enforceability of contract provisions found to be at variance with the public policy declared by the Miller Act is a District Court decision in **United States v. Holloway Company**, 126 Fed. Sup. 347, where the court said (p. 348):

> "This court is of the opinion that the provisions in the contracts between the plaintiffs and the Holloway Company, to the effect no payment is to be due the subcontractor until final payment has been made by the Government to the prime contractor are contrary to the public policy to be gleaned by a reading of the Miller Act, Title 40, U. S. C. A., Section 270a, et seq. A study of this Act reveals Congress had in mind providing an efficient and speedy method whereby those supplying labor and materials to a person having a contract with the Government of the

United States for the erection of public improvements could in the event of proper performance of the contract on their part recover by an action on a payment bond to be furnished by the prime contractor and a corporate surety, the amounts due and owing said subcontractor at the completion of the latter's performance. Reasonable periods were inserted in the Miller Act within which an action to recover under a statutory bond could be had; . . . . Any contractual deviations from the objectives of the Miller Act which cause or tend to cause unwarranted delay to good faith subcontractors are against the public policy of the Act and should not afford an escape to those prime contractors who have secured insertion of the above covenants in contracts between them and subcontractors."

The opinion of the District Judge and the dissenting opinion of Judge Rives in the instant case effectively point out how the arbitration provision in this case, if upheld, would substantially deprive petitioner of the cause of action granted to him by the Miller Act.

The majority opinion in this case would enable unscrupulous prime contractors to cheat and swindle local subcontractors out of amounts justly earned by them, by the insertion in the fine print of voluminous subcontracts of burdensome agreements by which they could defeat payment altogether or reduce their payments to a small fraction of what they legitimately owe by making it so difficult and expensive for the local subcontractor to obtain payment that he will settle his claim for a small fraction of its real value. **That is exactly what has happened in this case**, according to the allegations of the complaint.

If petitioner is not permitted to maintain his suit, then, since he unquestionably can not properly present his claim in an arbitration proceeding in New York City, many

hundreds of miles from the Middle District of Georgia where the work was performed, the witnesses reside, and the government records are maintained, petitioner will be absolutely deprived of the benefits of the bond which the prime contractor was required to give for his protection.

In that situation the language of the Court of Appeals for the Second Circuit in United States v. Aetna Casualty and Surety Company, supra, would be most apt, where they said:

> "With no forum for enforcement, the bond becomes an empty gesture, a stately farce carried out by contractors and sureties, at the public expense, and to the detriment of the very class the Miller Act was designed to protect."

5. **The United States Arbitration Act is not applicable.**

It is petitioner's earnest contention that the Arbitration Act is not applicable for the reason that the subcontract in this case is not a "contract evidencing a transaction involving commerce" within the meaning of that Act.

It clearly appears from the record in this case that the prime contract involved entirely new construction of buildings and other facilities upon land which had been previously open farm land or forest (R. 74-75), that after completion of all of the construction required by the contract nothing was produced which became a part of any existing facility engaged in commerce (R. 76-77), but that a great deal of work and installation of equipment remained to be done by the Army (R. 77-78), the additional work and equipment involving an expenditure by the Army of twenty-eight million dollars (R. 97-98).

Under these undisputed facts the decision of this Court in **Murphy v. Reid, 335 U. S. 865, 69 S. Ct. 105, 33 L. Ed. 410** requires a holding that the subcontract in this case

was not a contract evidencing a transaction involving commerce, and the Arbitration Act is for that reason not applicable.

It was clearly held in **Bernhardt v. Polygraphic Co., 350 U. S. 198, 76 S. Ct. 273, 100 L. Ed. 199,** that the stay authorized by Section 3 of the Arbitration Act is applicable only to agreements for arbitration contained in the kinds of contracts specified in Section 2, namely maritime transactions and contracts evidencing transactions involving commerce.

Although this Court in **Mitchell v. C. W. Vollmer and Co.,** 349 U. S. 427, 75 S. Ct. 860, 99 L. Ed. 1196, and **Mitchell v. Lublin McGaughy and Associates, 358 U. S. 207, 79 S. Ct. 260, 3 L. Ed. 2d 243,** held the Fair Labor Standards Act applicable to construction which consists of repair of existing facilities already a part of commerce or an improvement to such facilities by adding other things to an existing facility which will enable it to operate more effectively, this Court has not extended even that act to construction of the type here involved, entirely new construction, which even after it was fully completed, did not become a part of any existing facility already engaged in commerce, but merely provided the bare building construction which was turned over to the Army which itself then had to perform labor and furnish material at a value of $28,800,000.00 before these Nike-Hercules bases could become a part of an existing defense system.

Furthermore, the Fair Labor Standards Act is much broader in its definition of commerce than is the meaning of that word as used in the Arbitration Act. The Fair Labor Standards Act defines commerce as "trade, commerce, **transportation, transmission or communication** among the several states" (Emphasis supplied).

The Arbitration Act by Sec. 2 applies only to a maritime transaction or "a contract evidencing a **transaction involving commerce**."

Therefore, under the Arbitration Act, it is not sufficient that the construction have an effect upon commerce, but the construction itself which the contract governs must be "a transaction involving commerce".

Thus, it would not have been sufficient even if the construction after it had been completed had become a part of a facility which was itself engaged in commerce, as would have been sufficient under the Fair Labor Standards Act. The particular transaction, the construction, must **involve commerce**.

Even, however, if this Court should conclude that the subcontract in this case was a contract evidencing a transaction involving commerce, and that the Arbitration Act would otherwise be applicable, it clearly cannot be applied so as to defeat the express purpose of Congress in enacting the Miller Act. The effect of its application would be to completely eliminate from the Miller Act the words chosen by Congress to guarantee that an unpaid subcontractor should have not only the right to sue but the right "to prosecute said action to final execution and judgment".

CONCLUSION.

The Court will observe from reading the voluminous subcontract which covers 34 pages in the record (R. 17-50), and which was in fine print, as signed by the parties (covering only 13 pages), that it represents a studied effort in its myriad paragraphs and subparagraphs to impose all kinds of burdensome obligations and agreements upon the subcontractor. Substantially every paragraph begins with the words "the subcontractor shall," "the subcontractor agrees," or words of similar import. The only paragraph in the whole contract in which the prime contractor agrees

to do anything is that paragraph denominated "payment" (R. 32), whereunder the prime contractor agrees to pay the contract price, but even that provision is hedged by various conditions, exceptions, limitations and reservations contained in the main paragraph and nine subparagraphs. It is alleged in the complaint that this contractor entered into the subcontract with the fraudulent intention of not performing its sole obligation under the contract, that is, payment to petitioner for the work done by him. It is alleged that the contractor conceived and carried out a fraudulent scheme to obtain a great amount of work and material from petitioner without paying therefor and to browbeat petitioner and other subcontractors into accepting much less than the real value of their claims, and that one of the means by which respondent contractor intended to carry out this fraudulent scheme was by use of the provision of the subcontract purporting to require any claim to be settled by arbitration in New York, the contractor knowing and intending that petitioner and other subcontractors would not be able to properly present their claims in an arbitration proceeding at such a distant point as New York City is from the Middle District of Georgia, and that therefore respondent would be able to have allowed in such proceeding all of its false and fraudulent claims that petitioner is not entitled to additional compensation for work done by him at respondent's direction, which was not covered by the subcontract and the many false and fraudulent back charges by respondent against petitioner.

Thus under the allegations of the complaint the respondent contractor has devised a scheme by which it seeks to completely nullify the specific provisions of the Miller Act that an unpaid subcontractor shall have the right to sue in the United States District Court in the district in which the work was performed, and the even more explicit right to prosecute such action to final execution and judgment. Respondent contractor seeks to substitute arbitration as

the exclusive remedy provided by the contractor instead of the prosecution to final execution and judgment of a suit on the bond as the exclusive remedy provided by Congress in the Act. Respondent contractor thus obviously seeks to thwart the purpose of Congress and seeks to do so for the purpose of carrying to completion its fraudulent and illegal scheme to obtain work and labor for which it is paid by the United States of America without itself having to pay therefor.

To apply the Arbitration Act in these circumstances would have the effect of assisting respondent contractor in perpetrating its fraudulent scheme. It would have the effect of removing from the Miller Act the words "shall have the right to prosecute such action to final execution and judgment," deliberately inserted by Congress. This would result in a defeat of the Congressional intent which this Court said in MacEvoy v. United States, supra, was "to remove the procedural difficulties . . . and thereby make it easier for unpaid creditors to realize the benefit of the bond."

We respectfully submit that the judgment of the Court of Appeals for the Fifth Circuit should be reversed and direction given to affirm the judgment of the District Court denying a stay and continuing the injunction against the arbitration proceedings.

Respectfully submitted,

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APPENDIX.

Provisions of the United States Arbitration Act.

As set out in 9 U. S. C., Secs. 1, 2 and 3.

1. "Maritime transactions" and "commerce" defined; exceptions to operation of title.

"Maritime transactions," as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce," as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

2. Validity, irrevocability and enforcement of agreements to arbitrate.

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

3. Stay of proceedings where issue therein referable to arbitration.

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.